IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23/02/2004

CORAM

THE HONOURABLE MRS. JUSTICE R.BANUMATHI

CRL.APPEAL No.946 of 1996

Sam Daniel ... Appellant /
Complainant

-Vs-

S. John ... Respondent

Criminal Appeal against the judgment dated 17.06.1996 made in
S.T. C.No.2171 of 1992 on the file of Judicial Magistrate, Padmanabapuram.

!For appellant : Mr. N.Rajan

^For respondent : Mr.C.Prakasam.

:J U D G M E N T

This appeal is directed against the order of acquittal made in S.T.C.No.2171 of 1992 on the file of learned Judicial Magistrate, Padmanabapuram by judgment dated 17.06.1996. Aggrieved over the order of acquittal, the Complainant has preferred this appeal.

2. The case of the Complainant is that he is working as Work Superintendent in Agricultural Department. The Accused is working as a Peon in Nesamani Memorial Christian College, Marthandam. Towards his timber business, the Accused had transaction with the Complainant during 1992. The case of Complainant is that on 14.04.1992, the Accused requested to advance Rs.75,000/- from the Complainant for his timber business. The Complainant had given the amount for which the Accused had issued Ex.A.1 - cheque (dated 08.06.1992) drawn on Canara Bank, Kuzhithurai Branch. On 17.07.1992, the Complainant has presented Ex.A.1- cheque through his Bankers - State Bank of India, Kuzhithurai Branch. Ex.A.1 cheque was returned with endorsement 'insufficient funds' . The matter was informed to the Complainant from the State Bank of India, Kuzhithurai Branch under Ex.A.2 - Memoramdum (dated 24.07.199 2). On receipt of Memorandum of cheque unpaid, the Complainant sent a statutory notice - Ex.A.4 (dated 07.08.1992) to the Accused. The notice was returned on 19.08.1992 as unclaimed. Thereafter, the Complainant has sent Ex.A.7 - Telegram calling upon the Accused to pay the amount. The Accused had not made any arrangement for repayment. Ex.A.1 - Cheque was given by the Accused knowingly well that there was no sufficient fund to honour the cheque.

Hence, the Complainant has filed the complaint under Sec.138 of Negotiable Instruments Act.

3. In the Trial Court, the Accused had entered appearance and contested the case. He denied the borrowing of the amount from the Complainant. According to the Accused, he is working as a Record Clerk in Nesamani Memorial Christian College, Marthandam. Further case of the Accused is that he purchased a Matador Van bearing Registration No. TN. 74-6579 for Rupees Two Lakhs from the Complainant, for which an agreement was entered into between the Accused and the Complainant and the Accused paid Rs.40,000/- as advance towards purchase of the Van. The Accused had entrusted the Van to a driver in Marthandam for plying. Later, the Accused came to know that the vehicle was in the name of one Sasikumar. Claiming ownership of the vehicle, the said Sasikumar had taken away the Matador Van. The Accused had filed a Civil Suit in O.S.No.242 of 1993 and obtained an order of interim injunction. The said Sasikumar had filed O.S.No.384 of 1995 against the Complainant, the Accused and Tamil Nadu Industrial Investment Corporation for repossession of the vehicle and for issuance of Search Warrant. The Accused had not obtained the documents of the vehicle. In that situation, only to settle the accounts relating to the vehicle, the Accused had signed in Ex.A.1 - Cheque and that no amount is payable by the Accused to the Complainant. The Accused contended that he suffered loss of more than Rs.1.50 Lakhs and that there is no legally payable debt by him to the Complainant.

4. In the Trial Court, parties have adduced evidence. Onbehalf of the Complainant, the Complainant examined himself as P.W.1 and Manager of State Bank of India (Venkatraman) was examined as P.W.2. Exs.P.1 to P.9 were marked. Onbehalf of the Accused, D.Ws.1 and 2 were examined and Exs.D.1 to D.3 were marked.

5. Upon consideration of the rival claim of the parties, the learned Magistrate disbelieved the case of Complainant that Ex.A.1 - Cheque was issued for the amount borrowed by the Accused towards his timber business. Elaborately referring to the various Civil Suits pending between the parties, the Trial Court raised doubts as to the amount payable by the Accused to the Complainant. Finding that ' there is no legally dischargeable debt payable on Ex.A.1 - Cheque ', the trial Court dismissed the complaint, acquitting the Accused. Aggrieved over the same, the Complainant has come forward with this appeal.

6. Taking me through the evidence of D.W.1 - John, the Accused herein, learned counsel for the Appellant / Complainant has submitted that the evidence of the Respondent / Accused as D.W.1 is totally irrelevant to Ex.A.1 - Cheque and the Trial Court erred in taking note of his evidence. Further submitting that the other suits have no relevancy to this transaction, the learned counsel assailed the findings, contending that the Trial Court ought not to have taken note of the same. It is further submitted that Ex.A.1 - Cheque has nothing to do with the Van transaction. Contending that the burden of proof is on the Accused in proving that no amount is due on the cheque, the learned counsel relied upon the cases of Hitten P. Dalal v. Bratindranath Banerjee (2001 Crl.L.J.4647) and Rajendran v. Usharani

(2001-1-L.W.(Crl.) 319).

7. Countering the arguments, learned counsel for the Respondent / Accused has taken me through the impugned judgment and submitted that the judgment of the trial Court is a well considered one. It is further submitted that the judgment / order of acquittal does not suffer from any serious or substantial error warranting interference.

8. Upon consideration of the impugned judgment, evidence, other materials on record and submissions of both sides, the following points arise for consideration in this appeal:-

(i) Whether the Complainant has proved legally enforceable debt or other liability under Ex.A.1 - Cheque ?

(ii) whether the order of acquittal suffers from any serious or substantial error warranting interference ?

9. Strict liability under Section 138 can be enforced only when the cheque is issued in discharge of any legally enforceable debt or other liability, partly or wholly. Where a cheque is issued not for the purpose of discharge of any debt or other liability, return of such cheque unpaid will not meet with the penal consequences and the maker of the cheque shall not, therefore, be liable for prosecution.

10. Explanation to Section 138 provides that a debt or liability under this section means only a legally enforceable debt or other liability. In common parlance, a debt is something owed to another, a liability, an obligation, a chose in action, which is capable of being assigned by creditor to some other person. A debt due means that a particular liability is in existence. Thus in cases for an offence of dishonour of cheque, it would be relevant to examine the materials / evidence as to whether there is a " debt payable " and whether the cheque was drawn for that dischargeable debt. While there may be a debt payable in existence, that alone is not sufficient to prove that the cheque was drawn in discharge of that amount. Where the Accused raised the point that the cheque in question was not intended to be in appropriation of the debt or to be used for a discharge of the debt, but was issued only as a collateral safeguard, there cannot be presumption under Sec.138 Negotiable Instruments Act.

11. By a plain reading of evidence, it is clear that the parties have involved in serious disputes on purchase of the Matador Van Registration No.TN-74 6579. The Accused claims to have purchased the above Van from the Complainant for Rupees Two Lakhs, for which he claims to have paid an advance of Rs.40,000/-. Documents are yet to be transferred to the name of the Accused. After the vehicle was put into operation within short time the Accused came to know that the R.C. Book of the vehicle stands in the name of one Sasikumar, who had taken away the Van. The Accused had not obtained the relevant documents for transfer of the vehicle in his name.

12. According to the Accused, the Complainant has received

Rs.40,00 0/- as advance towards the vehicle and he has agreed to hand over the documents of the vehicle before 29.02.1992 and he has not kept up his promise in handing over the documents. Per contra, the Complainant states that he has repaid the amount of Rs.40,000/-, which he has taken from the Respondent / Accused under the transaction. If really the Complainant had paid back Rs.40,000/-, the question arises as to why the Complainant has not obtained any document in writing regarding the return of the advance amount ? Definite case of the Accused is that to settle the account relating to the Van transaction, Ex.A.1 - cheque was issued as a collateral safeguard. In the light of the dispute between the parties, serious doubts arise as to whether Ex.A.1 - Cheque was actually issued for the discharge of any subsisting debt or liability.

13. Parties are involved / atleast in three suits as noted below:-

(i)O.S.No.292/93 : Suit filed by the Accused for permanent injunction and by obtaining interim injunction, Respondent/Accused had taken back the vehicle.

(ii)O.S.No.384/95 : Suit filed by Sasikumar against the Complainant, Accused and Tamil Nadu Industrial Investment Corporation for repossessing the vehicle and also for issuance of search warrant.

(iii)O.P.No.305/94: Petition filed on the file of Consumer Court by the said Sasikumar.

That apart, the Accused had also filed another criminal complaint against the Complainant in C.C.No.1677 of 1993 under Ss.419, 406, 417 and 420 r/w 34 I.P.C.

14. Since the parties are entangled in a series of litigation regarding the Van transaction and that Ex.A.1 - Cheque had come into existence in that situation, the learned Magistrate has rightly raised the doubts as to whether there is " debt payable " ? by the Respondent / Accused. According to the Complainant, he has advanced loan of Rs.7 5,000/- to the Accused for running the timber business. No documents are produced showing the advancement of loan and substantiating the claim. Mere admission of the Accused that he is running a timber mart in the name of his wife would not substantiate the debt payable on Ex.A.1 - Cheque.

15. Contending that the Accused has to prove by adducing cogent evidence that there was no debt or liability, the learned counsel for the Complainant has relied upon the cases of Rajendran v. Usharani (200 1-1-L.W.(Crl.) 319) and Hitten P. Dalal v. Bratindranath Banerjee (20 01 Crl.L.J.4647). In the first decision, the nature of presumption to be raised under Ss.138 and 139 of Negotiable Instruments Act was elaborately considered and it has been held ...

"... Because both Sections 138 and 139 require that the Court ' shall

presume' the liability of the drawer of the cheques for the amounts for which the cheques are drawn, as noted in it is obligatory on the Court to raise this presumption in every case where the factual basis for the raising of the presumption had been established. It introduced an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on the accused. Such a presumption is a presumption of law, as distinguished from a presumption of fact which describes provisions by which the Court 'may presume' a certain state of affairs..." 16. By a careful reading of the above, it is clear that for raising presumption under Sec.139 of Negotiable Instruments Act, the factual basis for liability is to be raised. As discussed earlier, serious disputes are shown to be between the parties. When Ex.A.1 - cheque is not shown to have been issued in discharge of any subsisting liability or debt, the presumption under Sec.139 of Negotiable Instruments Act cannot be invoked.

17. The reasonings and findings of the trial Court do not suffer from any erroneous approach. In an appeal against acquittal, the High Court would interfere only if there are glaring infirmities in the findings and conclusions of the Trial Court. The reasonings and findings are not shown to be suffering from serious or substantial error or perverse warranting interference. This appeal has no merits and is bound to fail.

18. For the reasons stated above, this appeal is dismissed.

Index: Yes

Internet: Yes

sbi

To

1. The Judicial Magistrate Padmanabhapuram.
2. The Chief Judicial Magistrate, Nagercoil.

□